INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	6
Conclusion	10

CITATIONS

Cases:

Allen v. *Trust Co. of Georgia*, 326 U. S. 630 8
Denniston v. *Commissioner*, 106 F. 2d 925 8
Goldstone v. *United States*, 325 U. S. 687 9
Palmer v. *Hoffman*, 318 U. S. 109 9
Steamboat Co. v. *Brockett*, 121 U. S. 637 9
United States v. *Gooding*, 12 Wheat. 460 9
Vanderlip v. *Commissioner*, 155 F. 2d 152, certiorari denied, 329 U. S. 728 8

Statute:

Internal Revenue Code, Sec. 811 (26 U. S. C. 1940 ed., Sec. 811) 2

Miscellaneous:

Treasury Regulations 105, Sec. 81.16 3

749470—47

petition for a writ of certiorari was filed on June 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain insurance policies were properly included in the gross estate of the decedent under Section 811 (c) of the Internal Revenue Code on the ground that the policies were transferred in contemplation of death.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by

trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax al-

though the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * * *

STATEMENT

The pertinent facts may be summarized as follows:

This is a suit to recover a deficiency in estate tax paid after rejection of the petitioner's claim for refund which was based on the ground that certain proceeds of life insurance on decedent's life were illegally included by the Commissioner in the gross estate (R. 2–8).

The decedent, a resident of New York, New York, died on April 25, 1941 (R. 44).

The twelve life insurance policies involved here, aggregating $117,400, were issued to the decedent during the period from 1919 to 1936, and all of the premiums were paid by him (R. 45–47). In 1936, the decedent assigned all of these policies to his wife (R. 4–7, 9–40, 42, 45–47, 109, 110). The decedent was in good health at the time of the transfers and did not anticipate imminent death (R. 111). At the time of decedent's death, no loans or charges of any kind whatsoever had been made or placed against the policies, nor had any of the other privileges therein provided been exercised by any of the parties interested therein (R. 47).

The District Court found that the preponderant motive of the decedent in transferring the insurance policies to his wife was to avoid estate taxes and that the transfers were made by the decedent in contemplation of death. It concluded as a matter of law that the insurance policies were transferred by the decedent in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926 as amended, and that the estate taxes in question were properly assessed. (R. 111.)

The Circuit Court of Appeals affirmed (R. 120–121, 124).

ARGUMENT

1. The finding of the District Court, concurred in by the Circuit Court of Appeals, that the preponderant motive of the decedent in transferring the insurance policies here in question to his wife was to avoid estate taxes, has support in the record. The testimony in this case disclosed that in 1935 an insurance broker advised the decedent to separate his insurance estate from his general estate, pointing out that the proceeds of the insurance policies could on his death be paid directly to his wife and daughter by the insurance companies without waiting for the probate of a will and the qualification of executors and thus payment of taxes by his estate could be avoided (R. 80–81). The broker also suggested that the decedent take out an additional policy so that he might be examined and have a record of physical examination "in the event any question in the tax angle developed * * * as to whether or not these policies were being transferred in contemplation of death." (R. 83.) The decedent took out the additional policy (R. 83). The policies which were then in a revocable trust were taken out of the trust and transferred so as to become payable on the decedent's death to certain beneficiaries (R. 80, 83). This was arranged by the broker at the request of the decedent (R. 90). The decedent had authorized the insurance companies to furnish the broker with

information and forms (R. 106). The broker wrote the companies giving them instructions as to the transfers of the policies that were required in order to meet the wishes of the decedent and the changes to be made, saying in each case "The above change to be on the irrevocable plan is for the purpose of avoiding payment of tax. It is the insured's intention that with the consent of his wife that loans be available during his life time." (R. 104–105.)

Not only does the record thus provide adequate support for the finding that the decedent's predominant motive was to avoid estate taxes, but, we submit, there was also a failure on the part of the taxpayers, upon whom rested the burden of proof, to establish by cogent evidence that the transfers were motivated by purposes associated with decedent's continued life. While under the transfers here in question certain privileges were given to the decedent's wife and daughter which they had not theretofore possessed, nevertheless, as found by the District Court (R. 47), none of these privileges had been exercised by any of the parties at the time of decedent's death.

2. The holding of the court below, that a motive to avoid estate taxes is necessarily testamentary and that, where such motive for a transfer is dominant, the transfer is in contemplation of death within the statutory meaning of that term, is in accord with the principles declared by this

Court in *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, and with the Second Circuit's recent decision in *Vanderlip* v. *Commissioner,* 155 F. 2d 152, in which this Court denied certiorari on October 14, 1946, 329 U. S. 728. In the Petition for Certiorari in the *Vanderlip* case, the taxpayers alleged, as do the petitioners in the present case, a conflict with *Allen* v. *Trust Co. of Georgia, supra,* and with the decision of the Third Circuit in *Denniston* v. *Commissioner,* 106 F. 2d 925. For reasons set out in our Brief in Opposition in the *Vanderlip* case, we submit that the present decision is consistent with the now well-settled principles which control in this type of case.

3. The petitioners urge (Pet. 24–27) that certain letters written by the decedent and by the decedent's insurance broker (R. 104–107), were improperly admitted in evidence. We submit that this evidence was properly considered. The decedent had authorized the broker to arrange for the settlements with the insurance companies and likewise had authorized the insurance companies to furnish the broker any information or forms which the broker should request in connection with the life insurance policies. The statement made by the insurance broker was in connection with the securing of forms and information from the insurance companies which were necessary in making the changes which the decedent had authorized. The declarations made by the broker in performing these duties were in the regular course

of business and within the apparent scope of the agent's authority. As such they were competent evidence, as the court below held. *United States* v. *Gooding,* 12 Wheat. 460, 467; *Steamboat Co.* v. *Brockett,* 121 U. S. 637, 648–649. As was also pointed out in the concurring opinion in the present case (R. 121–123), the court's ruling on the admissibility of this evidence does not ignore nor repudiate *Palmer* v. *Hoffman,* 318 U. S. 109, which involved a statement of an employee favorable to the employer and was not a statement made in the regular course of business.

Furthermore, the broker's written statement is supported by his oral testimony which indicates that the decedent had agreed to the changes in order to avoid estate taxes. (R. 81–83.) Thus such purpose was amply proved by the Government's witness.

4. The issue discussed by petitioners (Pet. 21–24) in regard to whether the assignments here were transfers to take effect in possession or enjoyment after the decedent's death was not decided by the District Court although it indicated that, as to some of the policies, there was certainly a "possibility of reverter" to the decedent (R. 109). The Circuit Court of Appeals also reached a similar conclusion as to eight policies and indicated that in view of *Goldstone* v. *United States,* 325 U. S. 687, this would also be a ground for including the proceeds in the gross estate. As to the four remaining policies in which there was a re-

mote reversionary interest which might take effect by operation of law, the court indicated that the possibility of reversion might be too remote and so preferred to rest its decision on the ground that the transfers were in contemplation of death.

We submit that in view of the basis for the court's decision, there is no need for further review of this point.

CONCLUSION

The decision below is in accord with principles announced by this Court. There is no conflict. The petition should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
LEE A. JACKSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

JULY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947